COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP641 **Cir. Ct. No. 2005GN35**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF PEARL E. J.:

RALPH J., WILLIAM J., AND BARBARA F.,

APPELLANTS,

V.

WALWORTH COUNTY,

RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Reversed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Barbara F., Ralph J. and William J. appeal from an order of the trial court adjudicating their mother, Pearl E.J., incompetent due to the

infirmities of aging, ordering Pearl's protective placement at a community-based residential facility and appointing a corporation as her permanent guardian. While Barbara, Ralph and William raise several issues for our review, we consider one to be dispositive:[1] whether the trial court lacked competence to proceed with the final hearing on the petition for guardianship and protective placement after the expiration of the thirty-day time limitation set forth in WIS. STAT. § 55.06(11) (2003-04).[2] We conclude that it did not have competence to proceed and reverse the order of the trial court.

¶2 The case underlying this appeal began as an emergency detention under WIS. STAT. ch. 51 in May 2005. At the probable cause hearing held on May 19, the court determined that Pearl was not appropriate for commitment under ch. 51, but that there was probable cause to believe that grounds existed for protective placement under WIS. STAT. § 55.06(2). The court, therefore, converted the proceeding to a guardianship and protective placement action under WIS. STAT. chs. 55 and 880. The court appointed Guardianship Options Ltd. as the temporary guardian for Pearl for sixty days unless further extended by the court and ordered that temporary protective placement be made for not more than thirty days. A hearing was scheduled for June 17. On May 26, Walworth County filed a petition for the appointment of permanent guardianship and for protective placement.

[1] See ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (we need only address dispositive issues and decide the matter on the narrowest ground).

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 At the June 17 hearing, the parties outlined their positions for the court. The County urged the court to protectively place Pearl at Vintage on the Ponds, a licensed community-based residential facility where Pearl had been residing for the previous weeks, and to appoint Guardianship Options as her permanent guardian. Robert J., one of Pearl's sons, and the guardian ad litem concurred in this recommendation. However, Barbara, Ralph, William and Walter, four of Pearl's children, asked the court to place Pearl with Barbara so that Barbara could care for Pearl in her home in Arizona. Their attorney informed the court that they were prepared to proceed with the final hearing "if the court has the time to do so." The court then stated, "Sorry. No, I don't." To which their attorney responded, "Yes sir. Then in absence of that, we would like to request a hearing at which time we can flush out the issues involved with the guardianship …." The court set a hearing for September 14. On July 1, the court extended the letters of temporary guardianship until September 16.

¶4 At the September 14 hearing, the court heard testimony from Ralph, Walter, William and Barbara. The four children each testified that Pearl had expressed a desire to live with Barbara and that they thought it would be in Pearl's best interests for her to do so. Barbara also testified to her understanding of the consistently high level of care her mother would require and to her ability to provide that level of care. Two employees of Vintage on the Ponds also testified that Pearl had stated her desire to live with Barbara. However, another employee and Pearl's caregiver testified that Pearl had told them she would like to *visit* Arizona, but not necessarily *move* there. Further, the social worker who conducted the comprehensive evaluation of Pearl testified to her reasons for recommending that Pearl remain at Vintage on the Ponds and Guardianship Options assume the role of permanent guardian.

¶5 During closing arguments, each party reasserted their original positions. Barbara, William, Walter and Ralph maintained that Barbara possessed the willingness and ability to care for her mother in Arizona and the move was in Pearl's best interests. Robert informed the court that he wanted only what was in his mother's best interests and would acquiesce in whatever decision the court made, but stood by his position that it was in Pearl's best interests to remain at Vintage on the Ponds with Guardianship Options serving as her guardian. The County and the GAL advanced this same argument, insisting that Barbara did not really understand the level of care Pearl required. Pearl was not represented by full legal counsel at the hearing.

¶6 The court found Pearl incompetent due to the infirmities of aging, appointed Guardianship Options as the permanent guardian and protectively placed Pearl at Vintage on the Ponds. The court recognized that all of the children had Pearl's bests interests in mind and that none of the children were directly opposed to Barbara's plan. The court explained, however, that most of Pearl's family and friends lived in the area and the church she attended for most of her life was close by as well. The court expressed confidence in the level of care available at Vintage on the Ponds. The court applauded Barbara for offering to take care of her mother, but determined that she would not be able to handle the "24/7" care Pearl required. Barbara, Ralph and William appeal.

¶7 Barbara, Ralph and William challenge the trial court's competence to hold the final hearing on the petition for guardianship and protective placement, complaining that the court held the final hearing after the expiration of the thirty-day limitation in WIS. STAT. § 55.06(11)(c). The application of statutory requirements to undisputed facts is a question of law that we review

independently. ***State ex rel. Sandra D. v. Getto***, 175 Wis. 2d 490, 493, 498 N.W.2d 892 (Ct. App. 1993).

¶8 When an individual is detained under WIS. STAT. ch. 51, the court must hold a probable cause hearing within seventy-two hours of that detention to determine whether there is probable cause to believe that the individual is appropriate for commitment. WIS. STAT. § 51.20(7)(a); ***Sandra D.***, 175 Wis. 2d at 495. If the court determines after the probable cause hearing that the individual is a fit subject for guardianship and protective placement, "the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under ch. 55 for a period not to exceed 30 days, and shall proceed as if petition had been made for guardianship and protective placement or services." WIS. STAT. § 51.20(7)(d); ***Sandra D.***, 175 Wis. 2d at 495-96. In other words, at this point, the court converts the case to a guardianship and placement action under WIS. STAT. chs. 55 and 880 and the court proceeds under those chapters. Like ch. 51, under WIS. STAT. § 55.06(11)(c), once the court finds probable cause to believe the person meets the general placement criteria, "the court may order temporary placement up to 30 days pending the hearing for permanent placement." *See also* ***Sandra D.***, 175 Wis. 2d at 494-96.[3]

¶9 A temporary placement under WIS. STAT. § 55.06 is an involuntary restraint on an individual's freedom and one who is incarcerated and deprived of his or her freedom pending a final hearing suffers substantial injury. ***County of***

[3] Since the 2005 filings of the petitions in this case, the legislature has overhauled the guardianship and protective placement statutes. However, these changes did not become effective until November and December 2006, well after the petitions were filed in this case. *See* 2005 Wis. Act 264 §§ 230 and 230m. and 2005 Wis. Act 387 §§ 584 and 585.

Dane v. N.N., 140 Wis. 2d 64, 69, 409 N.W.2d 388 (Ct. App. 1987). The legislature imposed tight timetables in connection with the involuntary detention of persons alleged to be incapable of caring for themselves in recognition of this significant liberty interest a person has in living where and under what conditions he or she chooses. ***Kindcare, Inc. v. Judith G.***, 2002 WI App 36, ¶12, 250 Wis. 2d 817, 640 N.W.2d 839. Thus, unless the time limits are obeyed, a court loses competence to decide whether that liberty interest should give way in the face of more significant considerations. ***Id.*** (holding that the trial court loses competence if the probable cause hearing under § 55.06(11)(b) is not held within seventy-two hours); ***Sandra D.***, 175 Wis. 2d at 493 (holding that the trial court lacked competence to proceed with the final hearing on the petition after expiration of the thirty-day limitation in § 55.06(11)(c)); ***N.N.***, 140 Wis. 2d at 69 (holding violation of statutory timetables in § 55.06(11)(c) deprives the court of its jurisdiction).[4]

¶10 In this case, the court convened the hearing on June 17, which was within the thirty-day time limit. The parties indicated their readiness to conduct the final hearing on the petition, but the court did not have the time to proceed with the contested matter. The court extended the temporary guardianship and Pearl remained at Vintage on the Ponds. The court held the final hearing on September 14, which is well outside the expiration of the thirty-day limit in WIS. STAT. § 55.06(11)(c). Therefore, the trial court lacked competence to proceed

[4] Older cases speak in terms of a loss of a court's *jurisdiction*. *See* ***County of Dane v. N.N.***, 140 Wis. 2d 64, 69, 409 N.W.2d 388 (Ct. App. 1987). However, the more recent cases clarify that that a failure to adhere to mandatory statutory timetables travels to a court's *competence* to proceed. *See, e.g.*, ***State ex rel. Sandra D. v. Getto***, 175 Wis. 2d 490, 493 n.1, 498 N.W.2d 892 (Ct. App. 1993).

with that hearing. *See* ***Kindcare***, 250 Wis. 2d 817, ¶12; ***Sandra D.***, 175 Wis. 2d at 493; ***N.N.***, 140 Wis. 2d at 69.

¶11 The County offers two arguments in response. First, the County contends that Barbara, Ralph and William waived any violation of the statutory time limits by not raising an objection or filing a motion to dismiss in the lower court. However, our supreme court has consistently ruled that "a court's loss of power due to the failure to act within mandatory statutory time periods cannot be stipulated to nor waived." ***Green County Dep't of Human Servs. v. H.N.***, 162 Wis. 2d 635, 657, 469 N.W.2d 845 (1991).

¶12 Recently, in ***Sheboygan County Department of Social Services v. Matthew S.***, 2005 WI 84, ¶30, 282 Wis. 2d 150, 698 N.W.2d 631, *reconsideration denied*, 2005 WI 150, 286 Wis. 2d 104, 705 N.W.2d 664, *cert. denied*, 126 S. Ct. 1579 (Mar. 20, 2006) (No. 05-882), our supreme court refused to extend the waiver rule to a competency challenge based on the failure to comply with the Children's Code's mandatory statutory time limits. The court explained that waiver did not apply to cases involving competency challenges grounded on violations of mandatory statutory timetables where the legislature imposed such timetables to protect fundamental rights. *See* ***Matthew S.***, 282 Wis. 2d 150, ¶¶30, 36. In declining to impose waiver the court wrote, "The legislative history of the Children's Code shows that the legislature considers that strict time limits between critical stages within the adjudication process are necessary to protect the due process rights of children and parents." ***Id.***, ¶17 (citation omitted).

¶13 Barbara, William and Ralph rest their competency challenge on the mandatory statutory time limits of WIS. STAT. § 55.06(11), which governs the involuntary detention of proposed incompetents. The legislature imposed strict

time requirements in § 55.06(11) to protect a proposed incompetent's significant liberty interest in being subject to involuntary detention only if necessary. *See* ***Kindcare***, 250 Wis. 2d 817, ¶12. Thus, the tight time limitations of § 55.06(11) cannot be waived. *See* ***Matthew S.***, 282 Wis. 2d 150, ¶¶30, 36; ***N.N.***, 140 Wis. 2d at 69.

¶14 Second, the County urges us to apply the doctrine of judicial estoppel to bar Barbara's, William's and Ralph's competency challenge. Judicial estoppel is applied when a party asserts irreconcilably inconsistent positions at trial and on appeal and the difference is due to a deliberate strategy. ***State v. Edmunds***, 229 Wis. 2d 67, 85 n.3, 598 N.W.2d 290 (Ct. App. 1999). The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from playing "fast and loose" with the courts. ***Harrison v. LIRC***, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994).

¶15 The County claims that at the hearing Barbara, William and Ralph convinced the court to refrain from ordering final adjudication and, therefore, they cannot now take the opposing position that the court lost competence to proceed when it rescheduled the hearing in accordance with their wishes. However, the record clearly shows that Barbara, Ralph and William were prepared to proceed with the adjudication and it was the court's schedule that prevented them from doing so. Given this, we cannot say that Barbara, Ralph and William are now playing fast and loose with the judicial system. Barbara's, Ralph's and William's actions do not merit the application of judicial estoppel.

¶16 In sum, the trial court lost competence to proceed when it did not hold the hearing within the thirty-day timetable set by WIS. STAT. § 55.06(11)(c). Barbara, Ralph and William did not waive their competency challenge based on

the violation of the statutory time limitation in § 55.06(11) when they failed to raise it in the trial court and we will not apply judicial estoppel to bar it.[5]

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[5] We have two other concerns with the conduct of this case. First, despite the disputes over Pearl's wishes and her best interests, Pearl was not represented by advocacy counsel at the final hearing. A proposed ward has the right to representation by full legal counsel at the hearing and the trial court shall order such representation whenever "the court determines that the interests of justice require it." *See* WIS. STAT. § 880.33(2)(a)1. A proposed incompetent's fundamental liberty interests and rights to self-determination are at stake during guardianship and protective placement proceedings. Thus, the interests of justice demand that the trial court, on its own motion, appoint advocacy counsel whenever the proceedings become a contest. Second, Pearl was not present in the courtroom during the evidentiary portions of the September 14 hearing and her absence is not explained on the record. A proposed incompetent's physical presence in the courtroom during the proceedings is required, unless certain procedures are followed. ***Knight v. Milwaukee County***, 2002 WI App 194, ¶¶1, 3, 256 Wis. 2d 1000, 651 N.W.2d 890. A court should not make "a declaration of incompetency and the attendant restrictions on a proposed ward's liberty … without whatever input the proposed ward is able to give." ***Id.***, ¶3 (citing ***Bryn v. Thompson***, 21 Wis. 2d 24, 28, 30, 123 N.W.2d 505 (1963), in which the supreme court stated, "the incompetent's physical presence in the courtroom during the hearing" is required).